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**IN THE
COURT OF APPEALS OF INDIANA**

DEXTER L. BERRY,

Appellant-Defendant ,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A02-0707-PC-641

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0308-FB-12

February 13, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Tippecanoe Circuit Court denied a motion for credit time filed by Dexter L. Berry (“Berry”). Berry appeals and claims that the trial court should have granted him credit time from the date of his arrest until the date of his resentencing.

We affirm and remand.

Facts and Procedural History

Berry was convicted in 2002 of Class B felony armed robbery and sentenced to seventeen years incarceration. Upon direct appeal, a panel of this court rejected Berry’s arguments that there was insufficient evidence to support his conviction, that there was a material variance between the pleading and proof, and that Berry’s sentence was manifestly unreasonable. See Berry v. State, No. 79A02-0206-CR-494 (Ind. Ct. App. Jan. 13, 2003), trans. denied. (“Berry I”).

Berry then filed a motion to correct erroneous sentence pursuant to Indiana Code section 35-18-1-15, claiming that the trial court had violated his Blakely/Apprendi rights in imposing sentence. After the trial court denied his motion, Berry appealed. Another panel of this court concluded that, because Berry’s motion required consideration of matters outside the face of the sentencing judgment, the issues therein were not properly presented by way of a motion to correct erroneous sentence. See Berry v. State, No. 79A02-0501-PC-54, slip op. at 5 (Ind. Ct. App. Oct. 31, 2005) (“Berry II”).¹ The court in Berry II therefore remanded the case to the trial court with instructions to treat Berry’s

¹ A motion to correct an erroneous sentence is appropriate only where the sentence is erroneous on its face, not where the claim of error requires consideration of proceedings before, during, or after trial. Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). Claims that cannot be resolved by considering only the face of the judgment and statutory authority “may be raised only in direct appeal and, where appropriate, by post-conviction proceedings.” Id.

motion as a petition for post-conviction relief if his motion was properly verified pursuant to Indiana's post-conviction rules. Id.

Upon remand, the trial court, apparently having determined that Berry's motion was properly verified, granted Berry's petition and held a new sentencing hearing. On April 17, 2006, the trial court re-sentenced Berry to fifteen years incarceration and issued an amended sentencing order and abstract of judgment to reflect the amended sentence. Berry appealed yet again, this time claiming that he did not knowingly, voluntarily, and intelligently waive his right to be represented by counsel upon resentencing, and that the new sentence imposed by the trial court was inappropriate. Upon appeal, yet another panel of this court rejected Berry's arguments and affirmed the post-conviction court. See Berry v. State, No. 79A05-0605-CR-282, slip op. at 10 (Ind. Ct. App. Feb. 7, 2007) ("Berry III").

Undeterred, Berry filed a motion for credit time on June 14, 2007. The trial court denied Berry's motion on June 20, 2007, and Berry now appeals.

Discussion and Decision

The essence of Berry's argument is that the amended sentencing order and abstract of judgment issued by the trial court when it re-sentenced him to fifteen years did not give him credit for the proper number of days he spent confined prior to sentencing. We disagree.

In the trial court's original 2002 sentencing order, the trial court gave Berry credit for 113 actual days he spent in jail prior to sentencing.² The amended sentencing order and abstract of judgment issued in 2006 do not explicitly mention the 113 days credit. Instead, the amended sentencing order explained that "the remainder of the [2002] sentencing order remains in full force and effect." Appellant's App. p. 4. Thus, to the extent that Berry now complains that the trial court's amended sentencing order did not mention credit time for the time Berry had spent in jail, his argument is not convincing. The 2006 amended sentencing order left intact those portions of the original sentencing order not affected by the trial court's re-sentencing, including the 113 days credit Berry earned for time spent in jail prior to his original sentencing. Indeed, in its order denying Berry's motion for credit time, the trial court noted that it had "received confirmation from the Department of Correction that [Berry] is receiving one hundred thirteen (113) days jail credit[.]" Appellant's App. p. 6. This does not end our discussion, however.

As we understand his argument, Berry complains not only about the 113 days of jail credit not explicitly mentioned in the amended sentencing order; he also contends that the trial court's amended sentencing order should have given him credit time from the time he was arrested in 2002 until the time he was re-sentenced in 2006. In support of his argument, Berry cites Dolan v. State, 420 N.E.2d 1364, 1372 (Ind. Ct. App. 1981), which held that a defendant is entitled to credit time for time spent imprisoned from the date of arrest for an offense to the date the defendant is sentenced for that offense. Berry

² Berry did not include the original abstract of judgment in his appendix. But both the trial court's original oral and written sentencing orders credited Berry with 113 actual days in jail.

contends that, for purposes of calculating his credit time, the date he was sentenced was April 17, 2006, i.e. the date he was re-sentenced upon remand. Berry therefore claims he is entitled not to 113 days credit for the time he initially spent in jail before his original sentencing, but for the entire time he has been incarcerated from his arrest to his 2006 re-sentencing, which, as Berry figures it, amounts to 1,941 days, plus “good time credit,” for a total of 3,882 days credit. We are not persuaded.

The trial court was only required to credit Berry for the days he spent in jail before his *original* sentencing, not the time between his arrest and his re-sentencing in 2006. In the words of the Dolan court, the date of Berry’s sentencing for his offense was May 16, 2002, not April 17, 2006. Moreover, Berry overlooks the fact that from the time of his original sentencing in 2002 until his re-sentencing in 2006, he was in the custody of the Department of Correction. Because Berry is in the custody of the Department of Correction, the calculation of his time served is a function of that Department, not the trial court. See Robinson, 805 N.E.2d at 791 (holding that even credit time earned while in jail is subject to subsequent modification by the Department of Correction); Watkins v. State, 869 N.E.2d 497, 500 (Ind. Ct. App. 2007) (noting that while the trial court imposes a sentence, it is the Department of Correction which administers the sentence and maintains responsibility to deny or restore credit time), trans. denied. We therefore conclude that the trial court properly denied Berry’s motion for credit time.

That said, the State brings to our attention the possibility that the Department of Correction has apparently misinterpreted the trial court’s amended sentencing order. Indeed, the Department of Correction’s own website shows Berry as serving both the

original seventeen-year sentence imposed by the trial court in 2002 *and* the fifteen-year sentence imposed by the trial court in the 2006 amended sentencing order. See <http://www.in.gov/apps/indcorrection/ofs/?lname=berry&fname=dexter&search1.x=0&search1.y=0>. This is obviously incorrect. Therefore, although we affirm the trial court's denial of Berry's motion for credit time, we remand with instructions that the trial court inform the Department of Correction that Berry's original seventeen years sentence has been vacated and that Berry should currently be serving only the fifteen-year sentence imposed through the terms of the 2006 amended sentencing order, with 113 days credit for the time he spent in jail prior to his original sentencing.

Affirmed and remanded.

FRIEDLANDER, J., and ROBB, J., concur.